Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below.

The District Court for the Southern District of New York did not render an opinion but made an order vacating the ex parte order of examination of the District Court and which order is printed fully in the Record (Fol. 89).

The opinion of the Circuit Court of Appeals has been officially reported in 144 Fed. 2nd 47, and is printed in full in the Record (R. ~~25~~ 26).

Jurisdiction of This Court.

The decision of the Circuit Court of Appeals was filed July 7th, 1944 (R. 36). A petition for rehearing of the decision was denied on July 28th, 1944 (R. 40). The order of the Circuit Court of Appeals confirming the order of the District Court was entered on August 10th, 1944 (R. 48).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A., Section 347(a).

Statement of the Case.

The statement of the case already given in the petition under the heading "Summary Statement of the Matter Involved" is hereby adopted and made part of this brief.

Specifications of Errors.

Petitioner maintains that the Circuit Court of Appeals erred:

1. In holding that the District Court did not abuse its discretion in vacating the original ex parte order which granted Petitioner the right of examination of the Respondent pursuant to Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a as to transactions between the Bankrupt and the banking institution taken over by the Respondent for the purpose of liquidation.

2. That the order of the Circuit Court of Appeals in confirming the order of the District Court which vacated the ex parte order granting the Petitioner the right of examination of the Respondent restricts and limits the purposes of Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a governing the examination of witnesses.

Summary of Argument.

1. Petitioner, a Trustee in Bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a and the order of the Circuit Court of Appeals affirming the order of the District

Court which vacated the ex parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute.

2. The Circuit Court of Appeals has erred in ruling that the order of the District Court which vacated the ex parte order allowing the examination of the Respondent pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a was not an abuse of discretion since the right of examination could only be set aside where a clear abuse of discretion appears.

ARGUMENT

POINT I.

Petitioner, a trustee in bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-A of the Bankruptcy Act, 11 U. S. C. A. Sec. 44-A and the order of the Circuit Court of Appeals affirming the order of the District Court which vacated the ex-parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute.

The Petitioner is seeking the examination of Respondent with regard to transactions had between the Bankrupt and the Yokohama Specie Bank, which bank is in the process of liquidation by the Respondent. The Respondent has in his possession books and records of the Yokohama Specie Bank which would disclose the nature and extent of the Bank's transaction with the Bankrupt. The examination is sought to obtain information for the recovery of assets belonging to the Bankrupt estate in pending litigation between Petitioner and the Respondent and which information Petitioner seeks to establish a claim of $142,000 against the Respondent

as Superintendent of Banks of the State of New York (fols. 15-16).

Amongst other things, Petitioner seeks to examine into a particular transaction involving a deposit made by the Bankrupt on July 17th, 1941, in the sum of $150,000 in the Yokohama Specie Bank.

The Petitioner originally obtained an ex parte order from the District Court (fol. 4) calling for the examination of the Respondent based on his petition wherein he stated amongst other things, that as a result of the rejection of two claims filed with the Respondent in the sum of $142,000, he was about to institute a suit against the Respondent to establish his claim (fols. 10-21).

It was further stated in the petition that Petitioner was desirous of examining the Respondent with respect to the acts, conduct and property of the Bankrupt with particular regard to its transactions had with the Yokohama Specie Bank since the examination sought was necessary in order to establish the claims in view of the fact that the Respondent had in its possession books and records and other data referring to the transaction between the Bankrupt and the Yokohama Specie Bank (fols. 16 and 17).

The petitioner submitted an affidavit which was read in opposition to the Respondent's motion to vacate the ex parte order of the District Court, in which affidavit it was stated that the Petitioner had in his possession written exhibits outlining a scheme between the Yokohama Specie Bank and the Bankrupt so as to make it appear that moneys deposited by the Bankrupt in the Bank was transmitted to Japan although actually the moneys remained with the Bank in this country and was always available to the Bankrupt (fols. 72-78). He also stated that he had in his possession records which would tend to corroborate his claim that the Respondent had funds belonging to the Bankrupt (fol. 78).

The Respondent's application to vacate was based on statements wherein he denied that he or the Yokohama

Specie Bank had funds belonging to the Bankrupt and further claimed that the moneys received by the Bank had been received for transmittal to Japan and had been transmitted by cable on the same day received (fol. 51). He further stated that the Yokohama Specie Bank was not authorized to receive deposits but was only authorized to receive moneys for transmittal and that the records of the Bank in his possession did not disclose any deposit accounts of the Bank or anyone else (fol. 50).

He also urged that the allegations of Petitioner upon which the original ex parte order of examination was granted were fictitious and false as a matter of law, and that there was no reasonable cause shown for the proposed examination (fol. 53), and that the examination would cause expense and disruption of his staff which was not justified (fols. 55, 56).

The fundamental objection to the examination herein sought was that the petitioner has failed to show special cause for the examination, particularly in view of the Respondent's denial that the transaction sought to be examined into was as claimed by Petitioner in view of his version of the transaction.

Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a provides that "The Court may upon application of any officer, bankrupt, or creditor, by order require any designated persons * * * to appear before the Court * * * to be examined concerning the acts, conduct, or property of the Bankrupt."

The purposes of this Section have been expressed by this Court and various Circuit Courts of Appeal including the Court below on various occasions.

This Court in referring to the Section in *Cameron v. United States,* 231 U. S. 710 has stated:

> "The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the Court to discover the extent and where-

abouts and to come into possession of it that the rights of creditors may be preserved."

In *Matter of Eastern Utilities Investing Corporation,* C. C. A. (3rd) 98 F. (2nd) that Court stated:

"The purposes of Section 21-A has been universally recognized as that of discovery. The object of such proceeding is to afford creditors and officers charged with the administration of an estate full information in connection therewith in order that the necessary steps may be taken for its preservation."

Likewise, in the *Matter of Samuels and Lesser,* C. C. A. (2nd) Circuit, 215 Fed. 845, the Court below said concerning Section 21-a:

"That section is intended to provide a searching and summary method for the discovery of hidden assets not only by the examination of the bankrupt, but of other witnesses. The proceeding it authorizes is meant to assist the trustee in discovering and collecting the assets. The section confers authority upon the trustee or any creditor of the estate to apply for the examination of any person. The person to be examined cannot object to being sworn and examined on the ground that no issue has been made up for determination, neither can he object that there is no fact in dispute. The simple object is to obtain information as to the bankrupt's property."

See also:

Youroveta Home & Foreign Trade Company (C. C. A. 2nd), 288 Fed. 507;
Travis v. *U. S.* (C. C. A. 10th), 123 Fed. 2nd, 268;
Ulmer v. *United States* (C. C. A. 6th), 219 Fed. 641, cert. denied 238 U. S. 638;

In Re: *Paramount Publix Corporation* (C. C. A. 2nd), 82 Fed. 2nd 230.

Despite the pronounced purposes of the Statute as expressed by this Court and equally recognized by the Court below, Petitioner by the ruling of the Court below has been denied the opportunity of examining the Respondent although recognizing that Petitioner, a Trustee in Bankruptcy is entitled to have "reasonable judicial assistance in his task of locating the Bankrupt's assets" (Record 38).

It is respectfully submitted that sufficient has been shown by Petitioner both in the original petition upon which the ex parte order of examination was granted and in the reply affidavit to have warranted the examination.

It is obvious that petitioner seeks to examine the Respondent as to transactions relating to the acts, conduct and property of the Bankrupt and as for the purpose of discovering assets belonging to the Bankrupt estate. The Respondent cannot object to his examination merely because he has explained the transaction under inquiry and has disputed Petitioner's version of the nature of the transaction and has further denied possession of moneys belonging to the bankrupt estate. In the *Matter of Samuels and Lesser, supra*, the Court below has held that "the person to be examined cannot object to being sworn and examined on the grounds that no issue has been made up for determination, neither can he object that there is no fact in dispute." In the case at bar the facts and the nature of the transaction sought to be examined into are in dispute and certainly in light of the declared purposes of the Act as expressed by this Court and recognized by the Court below, the ruling of the Court below in denying the examination of the Respondent is contrary to the intent and purposes of the Statute. The Court below has even denied Petitioner the opportunity of examining the Respondent as to the bases of the Respon-

dent's statements regarding the transaction as explained by him.

The right of examination under the Statute is without limitation or restriction so long as it is in aid of administration and concerns the acts, conduct or property of the Bankrupt. The Petitioner is seeking information in the possession of the Respondent which is reasonably pertinent to the subject of inquiry and relate to the transactions and conduct of the Bankrupt and the whereabouts of its property. The inquiry will aid the creditors in properly understanding the affairs of the Bankrupt. Obviously the inquiry is in the nature of a fishing examination and is to obtain facts to support the pending litigation between petitioner and the Respondent. While the scope of the examination may, of course, be limited or restricted to facts pertinent to the inquiry, the examination itself should not have been denied since Petitioner has made it clear that he is only concerned with the acts, conduct and property of the Bankrupt which is within the purview of the Statute.

In *Travis* v. *United States, supra,* the Court in referring to the Statute has stated:

> "In order to attain these ends a reasonably wide latitude of inquiry should be allowed in examination of persons closely associated with the bankrupt in business or otherwise."

In *Ulmer* v. *United States* (C. C. A. 6th), 219 Fed. 641, the Court stated:

> "Any fact or circumstance is relevant and material which fairly tends to establish something which may become important in the administration of the estate. The existence of property rights or interests not scheduled or rights to defend against apparent claims, or rights of

creditors to reclaim property in the hands of the bankrupt, or rights of a bankrupt to discharge—all these are instances of matters properly subject to such investigation on such a proceeding."

The Court below although recognizing that a bankruptcy trustee is entitled to judicial assistance in locating bankruptcy assets (Record 38) has denied the application on the ground that Respondent as Superintendent of Banks is unbiased and has apparently disclosed all there was to the transaction which Petitioner has sought to examine (Record 38).

The fact that the Respondent is a responsible public official and is unbiased does not prohibit his examination. The Statute provides that the Court may upon due application order any *designated person* to appear before the Court to be examined concerning the acts, conduct or property of the Bankrupt and there is no prohibition in the Act against examining a public official so long as the inquiry is pertinent and it concerns the acts, conduct or property of the Bankrupt. The Court below has held in *Marx* v. *Chase National Bank,* 2nd Circuit, 117 Fed. 2nd, 800, that the Trustee was entitled to examine anyone who had dealings with the Bankrupt "because from the beginning it has been recognized that the Trustee may inquire at large and at length except in cases of plain abuse, to be determined in the Court's discretion." The Court below in referring to the Statute, has also held "the power to require any person to attend is given generously and we cannot write into the Act exceptions or limitations which it does not contain. It is enough for our present purposes to say that the words 'any person' mean what they say * * *" *Youroveta Home & Foreign Trade Co., supra.*

The ruling of the Court below is inconsistent and would pervert the purposes of the Statute as expressed by this Court and equally recognized by it, and has so far departed

from the accepted and usual course of judicial proceedings relating to examinations under the Statute as to call for an exercise of this Court's power of supervision.

POINT II.

The Circuit Court erred in deciding that the order of the District Court denying the examination of the Respondent was not an abuse of discretion since the order granting the examination could only be set aside where a clear abuse of discretion appears.

It is respectfully submitted that Petitioner in seeking the examination of the Respondent has shown sufficient facts to warrant the examination. And as we have pointed out, the fact that Petitioner's version of the transaction sought to be examined into differs from that of the Respondent and is disputed would not justify the denial of the right of examination. Since the inquiry is directed towards ascertaining information regarding the acts, conduct and property of the Bankrupt and a reasonable basis for such examination had been shown to the District Court, it was an abuse of discretion to deny the right of examination and the Circuit Court erred in affirming the order of the District Court vacating the ex parte order of examination.

The Circuit Court aptly stated the rule as follows:

> "It is quite true that an order requiring examination under Section A is discretionery * * *
> * * * But discretion, if abused, is error of law, and therefore reviewable by petition to revise, and it is an abuse of discretion to refuse to follow settled law; i.e. (inter alia), approved decisions, even when exercising discretion."

In Re A. & W. Nesbit, Ltd., 2nd Cir. 282 Fed. 265.

The ex parte order of the District Court could only be set aside where a clear abuse of discretion appears.

Matter of Eastern Utilities Investing Corporation, C. C. A. (3rd) 98 F. (2nd) 620;
Cameron v. *United States,* 231 U. S. 710;
North Ward Radio Co. v. *Grigsby Grunow Co.* (C. C. A. 3rd Cir.) 308, 67 F. (2d) 745;
Yellow Motor Co. v. *David* (C. C. A. 8th Cir.), 465, 27 F. (2d) 597;
National Fire Insurance Co. v. *Thompson,* 281 U. S. 331, 50 S. Ct. 288, 74 L. Ed. 881;
United States v. *Corrick,* 298 U. S. 435, 56 S. Ct. 829, 80 L. Ed. 1263.

The decision of the Circuit Court of Appeals that the District Court did not abuse the discretion vested in it to determine whether or not special cause for the examination was sufficiently shown is clearly untenable and in conflict with the overwhelming weight of authority.

CONCLUSION.

It is therefore respectfully submitted that the errors in law of the Court below, and the equities and justice of this case call for the exercise by this Court of its supervisory powers, and to that end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Respectfully submitted,

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